

STATE OF MICHIGAN
IN THE SUPREME COURT

ALICE JO MORALES, as Guardian and
Conservator of ANTONIO MORALES,
a/k/a ANTHONY MORALES,
a legally incapacitated person,

Plaintiff/Appellant,
Cross-Appellee

v.

AUTO OWNERS INSURANCE COMPANY,
a Michigan corporation,

Defendant/Appellee
Cross-Appellant.

Supreme Court
Docket No. 122601

Court of Appeals
Docket No. 233826

Lower Court No.: 92-2882 NF
Hon. Charles D. Corwin

MILLER, SHPIECE & TISCHLER, P.C.
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NOTICE OF HEARING

PLAINTIFF/APPELLANT'S MOTION TO FILE SUPPLEMENTAL BRIEF

BRIEF IN SUPPORT

PROOF OF SERVICE

FILED

DEC 18 2002

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

STATE OF MICHIGAN

SUPREME COURT

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NOTICE OF HEARING

TO: CLERK OF THE COURT AND ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that the attached **MOTION TO FILE SUPPLEMENTAL BRIEF** will be heard before the SUPREME COURT on **TUESDAY, JANUARY 7, 2003**, in the Supreme Court.

Respectfully submitted,
MILLER, SHPIECE & TISCHLER, P.C.

BY: 

WAYNE J. MILLER (P31112)
Attorneys for Plaintiff/Appellant
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Date: December 17, 2002

STATE OF MICHIGAN
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PLAINTIFF-APPELLANT'S MOTION TO FILE SUPPLEMENTAL BRIEF

NOW COMES, Plaintiff-Appellant ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, by and through their attorneys MILLER, SHPIECE & TISCHLER, P.C. moves this Court for permission to file a supplemental brief in response to Defendant AUTO OWNERS INSURANCE COMPANY's Brief in Opposition to Plaintiff-Appellant's Application For Leave to Appeal and to supplement Plaintiff-Appellant's motion for leave to appeal. In support of their motion, Plaintiffs state:

1. Plaintiff-Appellant has filed leave to appeal in this case seeking to reverse the Court of Appeals decision that held that "Prejudgment interest does not continue to accrue

during the appellate process.”

2. Plaintiff-Appellant seeks leave to file a supplemental brief to its initial application for leave to appeal for two reasons: First, because Defendant-Appellee’s response contains numerous blatant misrepresentations of the facts. Second, Defendant-Appellee argues for the first time that MCL 600.6013(5), as amended no longer applies to this case. Plaintiff-Appellant’s response to Defendant-Appellee’s new argument includes a line of cases germane to this appeal that holds that voluntary payment of a judgment bars appellate challenge of that issue. Plaintiff-Appellant believes that if this Court is apprized of the factual record of this case and considers the supplemental authority in conjunction with the facts, the Court will agree that the Court of Appeals decision is erroneous and will grant leave to appeal.
3. The first factual misrepresentation is Defendant-Appellee’s assertion that Plaintiff-Appellant never raised the issue of detrimental reliance in the trial court, offered to explain and excuse the Court of Appeals failure to address this critical issue. (See p.16 of Defendant’s Brief in Opposition of Plaintiff-Appellant’s Leave to Appeal marked as Exhibit A). Defendant-Appellee is clearly mistaken. Attached as Exhibit B. is the transcript of the trial court hearing on Defendant Appellant’s Motion For Relief From Judgment. The Transcript clearly shows that Plaintiff-Appellant argued at length that Defendant’s motion for Relief from Judgment must be denied because Plaintiff-Appellant relied on the judgment entered and the prejudgment interest voluntarily tendered by Defendant-Appellee. (See motion transcript pages 14 through 18)

4. The second factual misrepresentation is Defendant-Appellee's repeated reference to the amount of prejudgment interest paid to Plaintiff-Appellant as an amount of prejudgment interest *awarded* to Plaintiff by the Court. This implies that the amount of prejudgment interest paid by Defendant-Appellee to Plaintiff-Appellant was disputed by Defendant. This too is clearly a misrepresentation of the facts. The amount of the prejudgment interest voluntarily paid to Plaintiff-appellant by Defendant-Appellee and was never adjudicated by the trial court. The amount of prejudgment interest paid to Plaintiff-Appellant was the result of a concerted effort by the Plaintiff-Appellant and Defendant-Appellee to reach an amount acceptable to both parties. It was then tendered by the Defendant-Appellee and subsequently reduced to judgment and entered in the Trial Court. (See various correspondence between Plaintiff-Appellant and Defendant-Appellee marked as Exhibit C)
5. The third factual misrepresentation is that that the judgment for prejudgment interest entered with the trial court was not a final order. Therefore, reasons Defendant-Appellee, Plaintiff-Appellant could/should not have relied on it. This is also clearly a misrepresentation of the facts. The Judgment of Principal Benefits Owed, Prejudgment Interest and No-Fault Penalties entered with the trial court September 26, 2000 contained the words "this judgment is a final judgment" and was understood by Defendant to be a final judgment. (See copy of judgment marked Exhibit D)
6. Finally, Defendant-Appellee argues for the first time that MCL 600.6013(5) as amended effective March 1, 2002 no longer applies to this case. Plaintiff-Appellant's initial Leave to Appeal was based primarily on the clear and unambiguous language of the statute as it was written prior to the amendment. The amendment does not

effect the method of calculating prejudgment interest on a written instrument. Additionally, the amendment applies to complaints filed on a civil action that has not resulted in a final, nonappealable judgment as of July 1, 2002. The judgment in this case is both “final” and “non-appealable.” That it is “final” is not disputed, otherwise the Court of Appeals would not have taken the appeal. The judgment is “non-appealable” because it was voluntarily paid by Defendant-Appellant. “....voluntary payment or performance of a judgment bars appellate challenge.” *Industrial Lease-Back Corporation v Township of Romulus*, 23 Mich App 449 (1970). See also *Becker v Halliday*, 218 Mich. App. 576 (1996); *Dummings Enterprises v Shukert*, 231 Neb 370; 436 NW2d 199 (1989); *Bartel v New Haven Township*, 323 NW2d 806, (Minn 1982). It is clear that a judgment entered with the trial court and voluntarily satisfied is a final judgment and nonappealable on the merits of the issues. The trial court denied Defendant-Appellee relief from that judgment. The Court of Appeals erred in ruling on Defendant-Appellee’s argument regarding the calculation of prejudgment interest and ignoring the judgment that had been entered and satisfied.

WHEREFORE, for the reasons cited above, Plaintiff requests that this Court grant permission to file a supplemental brief.

Respectively submitted,

MILLER, SHPIECE, & TISCHLER, P.C.

Dated:

By



WAYNE J. MILLER P31112
Attorney for Plaintiff

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(248) 945-1040

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

This motion is brought pursuant to MCR 7.302(F)(4)(b), providing that on motion of any party, the Supreme Court may grant a request to add additional issues not raised in the application for leave to appeal, and MCR 7.316 that permits the reasons or grounds of an appeal to be amended or new grounds to be added.

Plaintiff-Appellant seeks permission to file a supplemental brief to respond to the flagrant misrepresentation of facts throughout Defendant-Appellant's brief on issues crucial to Plaintiff-Appellant's Leave to Appeal. Plaintiff-Appellant additionally requests permission to respond to Defendant-Appellant's argument that is raised for the first time, that MCLA 600.6013(5) as amended no longer applies to this case. To the contrary, the law is clear that voluntary payment of a judgment bars appellate challenge. The law not only negates Defendant-Appellee's argument regarding the applicability of the amendment of MCLA 600.6013(5) to this case but also lends additional support to Plaintiff-Appellate's Leave to Appeal. The following will help demonstrate that the Court of Appeals decision is clearly erroneous and if allowed to stand will cause material injustice to those involved.

THE ISSUE OF PLAINTIFF'S DETRIMENTAL RELIANCE ON DEFENDANT-APPELLEE'S VOLUNTARY PAYMENT OF PREJUDGMENT INTEREST WAS FIRST RAISED IN THE TRIAL COURT.

The Court of Appeals in this case held that prejudgment interest does not accrue during the appellate process and remanded the case to the trial court for recalculation of prejudgment interest,

completely overlooking or ignoring the fact that Defendant-Appellee had voluntarily paid the prejudgment interest and that a judgment for prejudgment interest had been entered.

On page 16 of Defendant-Appellant's Brief in Opposition to Plaintiff-Appellee's Application For Leave To Appeal Defendant-Appellant states that the Court of Appeals failed to address the detrimental reliance issue because Plaintiff-Appellant failed to raise the issue before the lower court. This is a blatant misrepresentation of the facts. The following are portions of the Transcript of the oral argument on Defendant's Motion for Relief From Judgment, on February 26, 2001 (These comments are of Plaintiff's counsel, Wayne J. Miller.):

"....even if this is a mistake for which relief can be granted, there is also a body of law indicating that if we rely on the defendant's indication that they are going to go along with the calculations, then we are entitled to rely on that, and, in essence, it's kind of another estoppel argument....." Id. p. 17

"But the fact of the matter here, your Honor, is that this money has been spent and it's been spent long ago. It's been paid out to a number of service providers and also in large measure it's been paid over to the bankruptcy estate which my client has been forced to enter into as a result of the years long litigation that happened in this case." Id. p. 17

"There have been separate bankruptcy proceedings that have now gone on in the last year since the verdict in this case came down, bankruptcy trustee, the bankruptcy court has approved the disbursement of money, and I would only also add in addition to making the argument, that we relied on the defendant's approval of the judgment to say that if the Court is inclined to accept the defendant's argument, I believe that this matter now has to be turned over to the bankruptcy court, because the bankruptcy court has jurisdiction over this money at this stage I believe." Id. P. 18

The issue of detrimental reliance was sufficiently preserved by Plaintiff-Appellant for review by the Court of Appeals, yet the issue was ignored. *Township of Groveland v. Bowren*, 445 Mich. 906 (1994); *Dudewicz v Norris Schmid, Inc*, 443 Mich. 68 (1993)

THE AMOUNT OF PREJUDGMENT INTEREST PAID BY DEFENDANT - APPELLEE TO PLAINTIFF-APPELLANT WAS AN AMOUNT THAT WAS STIPULATED TO AND VOLUNTARILY PAID BY DEFENDANT

The Court of Appeals in its decision stated that "Defendant maintains that the trial court erred

by awarding prejudgment interest pursuant to MCL 600.6013 during the four years this case was on appeal because the delay was not the fault of the insurer. We agree.” Likewise, on page 10 of Defendant-Appellee’s brief the discussion of the prejudgment interest paid by Defendant-Appellee to Plaintiff-Appellant and entered in judgment, clearly leads the reader to believe that the amount of prejudgment interest was an area of contention that was resolved by the court. (P. 10 Defendant-Appellee’s brief) Defendant-Appellee has consistently tried to represent that prejudgment interest was a disputed issue and that tactical misrepresentation apparently succeeded in the Court of Appeals.

The amount of prejudgment interest entered in judgment and paid by Defendant-Appellee was not *“awarded to” Plaintiff by the Court nor was it disputed by defendant*. The prejudgment interest paid to plaintiff-appellant was an undisputed amount that was arrived at by calculating and recalculating the interest until it met with Defendant-Appellee’s approval. (See Exhibit C) The first time the issue of prejudgment interest was presented to the trial court was in Defendant’s Motion For Relief From Judgment which was held months after the judgment was entered and satisfied by Defendant-Appellee.

THE JUDGMENT FOR PREJUDGMENT INTEREST AND NO-FAULT BENEFITS WAS STIPULATED TO BY DEFENDANT AND ENTERED AS A FINAL JUDGMENT AS TO THOSE ISSUES

Defendant-Appellee on page 16 of its brief states “The Order granting Plaintiff the payment in the amount of \$998,152.95 was not a final order. Therefore, if plaintiff disbursed the funds before the final judgment was entered, it did so at its own risk *that the decision would be changed* and his reliance cannot be “reasonable” as a matter of law.”(emphasis added.) What decision is the Defendant-Appellee referring to? There was no hearing or decision. When Defendant tendered the \$998,152.95 check representing the no-fault benefit and prejudgment interest due it did so voluntarily and on its own accord. When judgment was entered the only issue in dispute was Plaintiff’s

entitlement to no-fault penalty interest which was clearly reserved in the judgment for future resolution. The judgment entered was understood to be a final judgment resolving all issues except Plaintiff's entitlement to no-fault penalty interest. If voluntary payment without a reservation of rights isn't enough evidence that this is so, surely the claim of appeal filed within 28 days from the filing of the Judgment appealing plaintiff's entitlement to no-fault penalty interest provides conclusive evidence that the judgment filed was believed to be final on the issues. (See Claim of Appeal marked Exhibit E) Only after the Court of Appeals required the judgment reflect the amount of no-fault penalty interest disputed before it could be considered a final judgment did Defendant-Appellee learn that it was not in fact a final judgment for a claim of appeal. It was always a final judgment for the issue of prejudgment interest.

THE AMENDMENT TO MCL 600.6013(5) DOES NOT EFFECT THE REQUIREMENT THAT PREJUDGMENT INTEREST ON A WRITTEN INSTRUMENT IS CALCULATED FROM THE DATE OF FILING THE COMPLAINT TO THE DATE OF SATISFACTION OF THE JUDGMENT.

Defendant-Appellee raises for the first time the argument that MCL 600.6013(5) as amended effective March 1, 2002 no longer applies to this case. MCL 600.6013(5) still requires that a judgment rendered on a written instrument be calculated from the date of filing the complaint to the date of satisfaction of the judgment. The method of calculating prejudgment interest on a written instrument remains unchanged. The statute was amended in several respects but none of the amendments can be interpreted to read "interest on a written instrument is tolled while on appeal."

THE AMENDMENT TO MCL 600.6013(5) APPLIES TO THOSE CASES WHERE A COMPLAINT HAS BEEN FILED AND NOT RESULTED IN A FINAL AND NONAPPEALABLE JUDGMENT AS OF JULY 1, 2001.

The amendment of MCL 600.6013(5) is applicable to complaints filed where a final, nonappealable judgment has not been entered before July 1, 2001. In the instant case a final nonappealable judgment has been entered. ".....voluntary payment or performance of a judgment

bars appellate challenge.” *Industrial Lease-Back Corporation v Township of Romulus*, 23 Mich App 449 (1970). See also *Becker v Halliday*, 218 Mich. App. 576 (1996); *Dummings Enterprises v Shukert* 231 Neb 370; 436 NW2d 199 (1989); *Bartel v New Haven Township*, 323 NW2d 806 (Minn1982). These cases require that a judgment be set aside before the merits of the judgment can be challenged on appeal. Defendant-Appellee’s Motion for Relief From Judgment was denied by the trial court. The Court of Appeals ignored the issue. The judgment was never set aside.

A trial court’s decision on a motion to set aside a consent judgment is reviewed for abuse of discretion. *Hadfield v Oakland County Drain Comm’r*, 218 Mich. App. 351 (1996) “An abuse of discretion is found only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias.” *Barrett v Kirtland Cmty College*, 245 Mich. App. 306 (2001). There are numerous facts on the record to support the trial court’s denial of Defendant’s motion for relief from judgment. The Defendant voluntarily paid the judgment and stipulated to the amount of the judgment entered. The Plaintiff was forced into bankruptcy and an order entered with the bankruptcy court permitted disbursement of the prejudgment interest to Plaintiff’s numerous creditors who waited years for their money. There was no evidence giving rise to an abuse of discretion on the part of the trial court when it denied Defendant-Appellant relief from the judgment. The only argument made by the Defendant-Appellee was that prejudgment interest should have tolled during the appeals. The above cited cases have held this is not permitted.

DEFENDANT-APPELLEE SHOULD BE PRECLUDED FROM ARGUING THE AMOUNT OF PREJUDGMENT INTEREST AND THE METHOD OF CALCULATION BECAUSE IT WAS STIPULATED TO PRIOR TO THE AMENDMENT.

The Defendant-Appellee should additionally be precluded from arguing the issue of the calculation of prejudgment interest because the rate and method of calculation was stipulated to prior

to filing the appeal. In an unpublished opinion per curiam *Housing Products Company v Flint Housing Commission*, docket No. 233605, decided November 15, 2002 after MCL 600.6013(5) was amended, the Court of Appeals held MCL 600.6013(5) is applicable to cases based on a written contract and that the Defendant in that case was precluded from disputing the date twelve percent prejudgment interest began running on a written instrument pursuant to MCL 600.6013(5), based on the fact that Defendant had expressly stipulated to the interest calculations before the appeal was filed. (See Case marked as Exhibit F)

WHEREFORE, Plaintiff-Appellant respectfully requests this Court grant Leave to Appeal the Court of Appeals decision regarding Prejudgment interest.

Respectfully submitted,

MILLER, SHPIECE & TISCHLER, P.C.

BY: 

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Date: December 16, 2002

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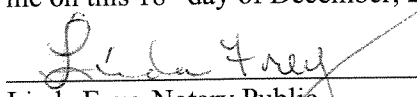
PROOF OF SERVICE

STATE OF MICHIGAN)
OAKLAND COUNTY)

Robin R. Stewart, an employee of MILLER, SHPIECE & TISCHLER, P.C., being first duly sworn, deposes and says that on December 11, 2002, she served a copy of PLAINTIFF/APPELLANT'S MOTION TO FILE SUPPLEMENTAL BRIEF, NOTICE OF HEARING and this PROOF OF SERVICE upon attorney Lori M. Silsbury, 800 Michigan National Tower, Lansing, Michigan 48933-1742, by enclosing a copy of the same in an envelope properly addressed, and by depositing said envelope in the United States Mail with postage thereon having been fully prepaid.


Robin R. Stewart

Subscribed and sworn to before
me on this 18th day of December, 2002.


Linda Frey, Notary Public
Oakland County, Michigan.
My Commission Expires: 7/01/03
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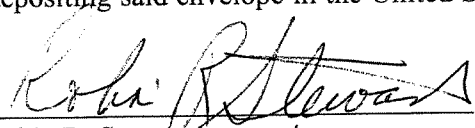
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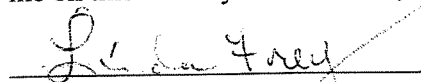
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Robin R. Stewart

Subscribed and sworn to before
me on this 18th day of December, 2002.


Linda Frey, Notary Public
Oakland County, Michigan.

My Commission Expires: 7/01/03

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